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No. 87-1857

Supreme Court, U.S.

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In The
Supreme Court of the United States

October Term, 1987

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PRESTON DRUMMER,

Petitioner,

v.

ROBERT NOEL and GENERAL
CINEMA BEVERAGES OF NORTH FLORIDA, INC.,

Respondents.

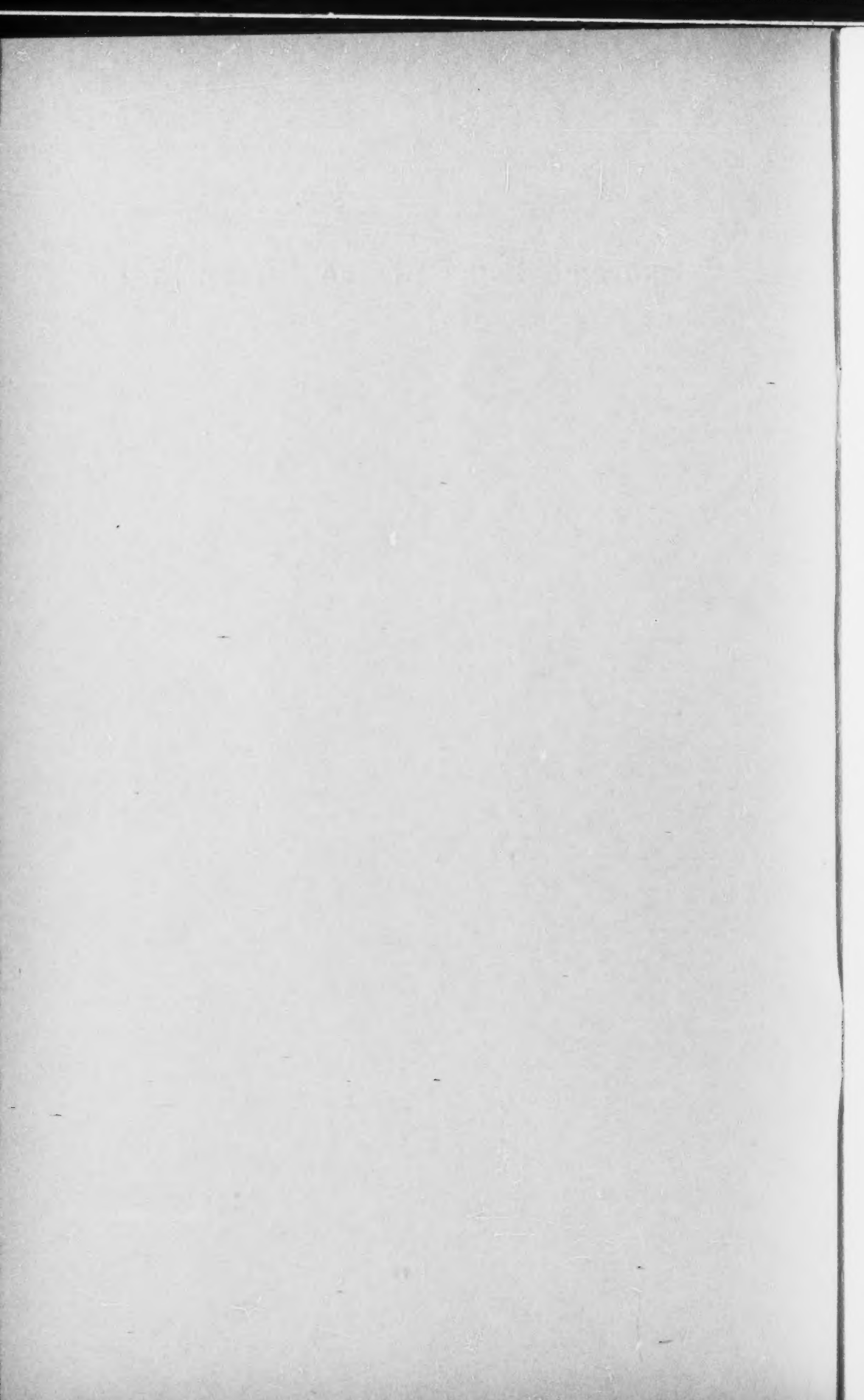
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**On Petition For a Writ of Certiorari
to The District Court of Appeal
For The First District, State of Florida**

—o—
**RESPONDENTS' BRIEF IN OPPOSITION TO THE
PETITION FOR WRIT OF CERTIORARI**

—o—
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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether this Court should substitute its judgment for the trial court's with respect to whether the statements in question, when considered in their context, are non-defamatory as a matter of law.
2. Whether the trial court applied the proper standard for proving actual malice in a defamation action which arises in the context of a labor dispute.
3. Whether the Florida courts properly held that the Plaintiff was not entitled to damages for mental pain and suffering under Florida State tort law.

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**I. STATEMENT OF GROUNDS ON WHICH
JURISDICTION IS INVOKED**

Respondents agree with the Petitioner's statement of the dates of the Final Summary Judgment by the trial court and the *per curiam* affirmance by the First District Court of Appeal for the State of Florida. (Pet. 7).¹ The

¹References to the Petition for Writ of Certiorari to the First District Court of Appeal of the State of Florida are indicated by the designation "Pet.", followed by the appropriate page number.

Petitioner does not state the grounds upon which jurisdiction is invoked, however. The Petitioner cites 28 U.S.C. § 2101 which merely sets forth the "time" for appeal or certiorari". (Emphasis added). The Petitioner, therefore, has not set forth the statutory provision which confers on this Court jurisdiction to review the judgment in question by writ of certiorari, as required by Rule 21, Sup. Ct. R. 21.1(e)(iv).

II. COUNTERSTATEMENT OF THE CASE AND THE FACTS

The Respondents agree with the statement of the case as set forth in the Petition, however, the Respondents further submit that subsequent to the Petitioner's filing his notice of appeal, the First District Court of Appeal for the State of Florida affirmed the trial court's Final Summary Judgment *per curiam* on February 11, 1988.

This case arose in the context of a labor dispute. The Petitioner engaged in a campaign to attempt to organize the employees of Respondent General Cinema Beverages of North Florida, Inc.'s ("General Cinema")² Pepsi Cola bottling plant located in Jacksonville, Florida. Respondent Robert Noel ("Noel") was the General Manager of the Jacksonville, Florida plant during this period. General Cinema hired SESCO Management, an outside consultant, to advise and counsel the Company concerning

²General Cinema, more properly GCC Beverages, Inc. d/b/a Pepsi Cola Bottlers of Jacksonville, is a division of General Cinema Corporation. GCC Beverages, Inc. has no subsidiaries.

how to handle the organizing campaign. Noel dealt directly with Mr. D. Paul Sommerville ("Sommerville"), an employee of Sesco Management.

During the course of the organizing campaign, Noel published several letters to employees of General Cinema containing statements concerning Drummer. Sommerville provided Noel with all of the information contained in all of the letters which Drummer finds objectionable. Sommerville conducted a thorough investigation of Drummer's reputation, organizing tactics, and qualifications as a union official. Noel relied on Sommerville's investigation and on Sommerville's expertise as a management consultant in signing the letters. Noel believed that the statements contained in the letters were true.



III. REASONS FOR DENYING THE PETITION

As provided in Supreme Court Rule 17, review on writ of certiorari is not a matter of right, but of judicial discretion. Sup. Ct. R. 17.1. Such review will be granted "only when there are special and important reasons therefor." *Id.* This case presents no special or important reason to grant the Petition for Writ of Certiorari. There are no novel points of law for this Court to consider. The Circuit Court for the Fourth Judicial Circuit of the State of Florida correctly applied settled legal principles to the particular facts of this case. The trial court's decision does not conflict with any decision of this Court.

A. THIS COURT SHOULD NOT SUBSTITUTE ITS JUDGMENT FOR THAT OF THE TRIAL COURT WITH RESPECT TO WHETHER THE STATEMENTS IN QUESTION, WHEN CONSIDERED IN THEIR CONTEXT, ARE NON-DEFAMATORY AS A MATTER OF LAW.

The Petitioner submits that the decision of the trial court, as affirmed by the District Court of Appeal, is in conflict with prior decisions of this Court. (Pet. 18). Specifically, the Petitioner states that the trial court judge "completely misunderstood this Court's decisions in [*Linn v. United Plant Guard Workers of America, Local 114, et al.*, 383 U.S. 53 (1966)] and [*Old Dominion Branch No. 496, National Ass'n of Letter Carriers, et al. v. Austin*, 418 U.S. 264 (1974)]." (Pet. 19). In support of this contention, the Petitioner states that this Court has expressly held that the use of such language as "liar" is not protected by federal labor law policy, and that "it is clear beyond dispute that statements such as 'Preston Drummer is a liar' are not protected." (Pet. 20, 21). The Petitioner, rather than the trial court judge, completely misunderstood this Court's decisions in *Linn* and *Austin*.

The Petitioner's reliance on *Linn* for the proposition that the trial court was precluded from finding that the use of the word "liar" was a statement of opinion and constituted mere rhetorical hyperbole is erroneous. Although *Linn* did involve an accusation that the plaintiff "lied", the Court did not address the issue whether such a statement was defamatory as a matter of law. Rather, because the trial court in *Linn* had dismissed the case finding that statements made in the course of a labor dispute are absolutely protected, the United States Supreme Court remanded the case, stating that the plaintiff should be

given the opportunity to bring a defamation action in this context if he could plead and prove actual malice and damages. Just as the Court did not consider whether any of the statements alleged in *Linn* were true, or whether the statements were made with malice, neither did the Court address whether the statements were defamatory as a matter of law. Petitioner has concluded that, because the Court in *Linn* did not specifically hold that the statements in question were *not* defamatory as a matter of law, the Court must have intended that the statements were actionable per se. The negative inference that the Petitioner has apparently drawn based upon the *Linn* Court's failure to address the issue whether the statements were defamatory as a matter of law is specious.

Unlike *Linn*, the Court in *Austin* specifically considered whether the statements in question were defamatory as a matter of law. In *Austin*, the Court acknowledged that name-calling is a part of the give-and-take of a union organizing campaign, and that, considering its context, such activity is not actionable. The Court further recognized that the context in which the statements were made and the readers to whom the statements were directed are essential considerations necessary to determine whether the language to which an individual takes exception was a false statement of fact or a protected statement of opinion which constitutes mere rhetorical hyperbole. *Austin*, 418 U.S. at 285, 286. Although the Petitioner would have this Court consider the statements out of their context, in contravention of *Austin*, the lower court in the instant case considered the context in which the statements were made, as evidenced by its decision, which states:

The Court has carefully read the letters which form the basis for Plaintiff's complaint and concludes that

they fall squarely within the type of "loose language" and "rhetorical hyperbole" which the Supreme Court has recognized is common in organizing campaigns and absolutely protected under federal labor laws. In the Court's opinion, no reasonable reader of any of the letters could conclude other than that the statements Plaintiff finds offensive were intended as opinions of the writer—"rhetorical hyperbole" published in the course of a hotly contested organizing campaign.

(App. 11).³ The trial court, therefore, considered the statements in their context in accordance with the Court's mandate in *Austin*.

The Petitioner's argument is based upon a misinterpretation of *Linn*. As indicated by its Final Summary Judgment, the trial court considered the standards enunciated by the Court in *Linn* and *Austin* in reaching its decision that the statements at issue fall squarely within the type of "loose language" and "rhetorical hyperbole" recognized by the Court as common in organizing campaigns and absolutely protected under federal labor laws. The Petitioner would apparently have this Court consider each specific statement that arises in the course of a union organizing campaign to determine whether, even taken out of context, the statements are actionable per se. The Petitioner's arguments do not warrant this Court's review.

³References to the Appendix which is attached to the Petitioner's Petition for Writ of Certiorari are indicated by the designation "App." followed by the appropriate page number.

B. THE TRIAL COURT APPLIED THE PROPER STANDARD FOR PROVING ACTUAL MALICE IN A DEFAMATION ACTION WHICH ARISES IN THE CONTEXT OF A LABOR DISPUTE.

As the Petitioner acknowledges, this Court has limited the availability of state court remedies for defamation based upon statements made in the context of a labor dispute to those instances where the complainant can show that the defamatory statements were circulated with malice and caused actual damages. *Linn*, 383 U.S. at 64, 65; *Austin*, 418 U.S. at 272, 273. Specifically, the availability of recovery in this case is governed by the standard for "actual malice" which was enunciated by the Court in *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Linn*, 383 U.S. at 64, 65. To establish that the statement was made with "actual malice", a plaintiff must prove that the defendant knew that the statement was false or acted with reckless disregard as to whether it was false. *New York Times v. Sullivan*, 376 U.S. at 279, 280.

In his statement of the questions presented, the Petitioner has framed the second issue as follows:

Is the making of statements without any factual basis or reasonable inquiry as to the truthfulness of those statements, sufficient evidence of actual malice to require submitting of the issue to the finder of fact.

(Pet. 1). Concerning the reference to "reasonable inquiry", the United States Supreme Court has specifically stated that mere proof of failure to investigate, without more, *cannot* establish reckless disregard for the truth. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 332 (1973).

The Petitioner states later in his Petition that:

The trial court, in what must be seen as a gross misreading of applicable law, held that since Drummer

did not prove that the Respondents knew the allegations were false, Drummer had not shown the requisite actual malice.

(Pet. 24). This is a flagrant misstatement of the basis for the trial court's decision. The implication that the statements in question were made "without any factual basis" is simply unsupported by the record. The trial court, in its Final Summary Judgment, recognized that Noel relied entirely on his management consultant to prepare the letters. (App. 15). The trial court also found compelling the considerable detail with which the management consultant set forth the inquiries made to obtain the information about Drummer before preparing the letters. (App. 15). The Petitioner's disregard for Sommerville's role in investigating the Petitioner's background and providing the information to which the Petitioner has taken offense is inexplicable.

A plaintiff cannot defeat a defendant's properly supported motion for summary judgment in a defamation case without offering any evidence but merely asserting that the jury might disbelieve the defendant's denial of malice. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The trial court in the instant case noted that the only "evidence" of malice offered by the Petitioner was his conclusory argument that the offending statements were false and known by the Respondents to be false. (App. 16, 17). As the trial court stated, the Petitioner's "beliefs", without more, were not sufficient to establish the existence of a genuine issue of material fact concerning the existence of actual malice in light of the evidence offered by Respondents. (App. 17, 18).

The absurdity of the Petitioner's argument is probably best demonstrated by his reliance upon *St. Amant v. Thompson*, 390 U.S. 727 (1968) to support his position that he has demonstrated sufficient evidence of actual malice to defeat summary judgment. In *St. Amant*, the defendant (St. Amant) read a series of questions which had been posed to a member of a Teamsters Union local and the union member's responses thereto during a televised speech. The plaintiff took offense to the union member's responses which apparently linked the plaintiff to allegedly nefarious activities of the president of the local union. *Id.* at 728, 729. The United States Supreme Court found that these statements were *not* made by St. Amant with reckless disregard for their accuracy, notwithstanding that St. Amant had no personal knowledge of the plaintiff's activities, relied solely upon the union member's statements even though there was no information concerning the union member's veracity, failed to verify the information with anyone in the union office, and gave no consideration to whether the statements defamed the plaintiff. *Id.* at 730. Just as St. Amant's reliance upon the union member's responses to questions was reasonable and did not rise to a level of reckless disregard, likewise Noel's reliance upon Sommerville's statements and investigation does not constitute reckless disregard for the truth.

The Petitioner's second argument is based upon a mischaracterization of the evidence before the trial court. A review of the trial court's Final Summary Judgment confirms that the court applied the proper standard and, based on the Plaintiff's failure to create a genuine issue of material fact, granted the Defendants' Motion for Summary Judgment. The Plaintiff does not raise any issues worthy of this Court's review.

**C. THIS COURT SHOULD NOT REVIEW THE
DECISION OF THE FLORIDA STATE COURT
CONCERNING THE PLAINTIFF'S ENTITLE-
MENT TO RECOVERY OF DAMAGES FOR
MENTAL PAIN AND SUFFERING UNDER
FLORIDA TORT LAW.**

The Petitioner correctly states that a plaintiff who seeks state law remedies for libel based upon statements made in the context of a labor dispute may not recover unless he is able to prove actual damages. (Pet. 26); *Linn*, 383 U.S. at 64. As the Petitioner states, the Court in *Linn* allowed that such damages may include "whatever form of harm would be recognized by state tort law." *Id.* The Court in *Linn*, therefore, deferred to the states for a determination of the damages that may be recoverable in a defamation action. *Id.*

The trial court in the instant case, relying on Florida tort law precedent, concluded that there existed no genuine issue of material fact upon which a reasonable jury could find that the Petitioner suffered any compensable harm as a result of the alleged defamatory statements. (App. 19). Florida's First District Court of Appeal affirmed the decision of the trial court. (App. 2-3). Notwithstanding the pronouncements of the Florida courts, the Petitioner, citing precedent under "Florida tort law", submits that he offered sufficient evidence to create a genuine issue of material fact as to the existence of damages. (Pet. 27). The United States Supreme Court has previously stated that it has no authority to review state court determinations of purely state law. *International Longshoreman's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380 (1986). The Petitioner's argument that the trial court, as affirmed by the

District Court of Appeal, improperly applied Florida law concerning the standard for proof of emotional distress does not warrant this Court's review.

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IV. CONCLUSION

Since the Petitioner has not cited the statutory provision under which he asserts this Court's jurisdiction, the Respondents must glean the alleged basis for jurisdiction from the body of the Petition. Based upon the tenor of his arguments, the Petitioner apparently contends that the trial court's Final Summary Judgment, as affirmed by Florida's First District Court of Appeal, is in conflict with the Court's decision in *Linn* and *Austin*. A cursory review of the trial court's Final Summary Judgment confirms that the Petitioner's argument is without merit.

There is nothing exceptional about this case. The trial court applied the precedent established by this Court and reached the only reasonable conclusion; the Petitioner failed to create a genuine issue of material fact upon which a reasonable jury could find the Respondents liable under the standards established in *Linn* and *Austin*. (App. 4-20). Respondents respectfully submit that the Petition in this case does not present "special and important" reasons warranting review.

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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